IN THE

Supreme Court of the United States

October Term, 1942.

No. 404

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of Albert B. Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of Albert B. Shultz, Deceased, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT WITH SUPPORTING BRIEF.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Exhibits

Printed copies of original exhibits (duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) essential to passing on this petition are being submitted herewith for this court's convenience.

Such printed exhibits, grouped in chronological order, include:

1. Correspondence, July—September, 1928, between Bank and Eastman-Dillon, as follows—
   Exs. P-54, P-520, (P-55 for identification), P-56, P-57, P-58, P-59, P-60, P-61, P-62.

2. Instruments and working notes drawn on Sept. 25 and 26, 1928—
   Exs. P-98, P-99, P-100.

3. Cable correspondence, etc., with decedent between Sept. 28 and Oct. 2, 1928—
   Exs. P-102a, P-104b, P-105a, P-106a, P-108.

4. Notice sent decedent on Oct. 11, 1928, agreement between Cooley and Bank's officers dated that day, and agreement supplemental thereto—
   Exs. P-101a, P-112, P-113.

5. Depositary receipt issued by Bank as escrow on Oct. 22, 1928—
   Ex. P-116b.

6. Receipts prepared by Bank for stockholders' signatures on Oct. 24, 1928—
   Ex. P-542; Ex. C to Complaints.

7. Snydicate agreement signed "as of" Nov. 1, 1928—
   Ex. D-4.

8. Letter from Bank, dated Dec. 6, 1928 and receipt that day procured by it from decedent—
   Exs. P-140, P-141.

IN THE

Supreme Court of the United States

October Term, 1942.

No.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGERT, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company,

Respondents.

Consolidated Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

PETITION FOR CERTIORARI.

(Note: References to the record are shown as to volume and page respectively by roman and arabic numerals, *i. e.*, [III 1865] is found in Volume III at page 1865 of the record. The causes were heard in the Circuit Court of Appeals and are being submitted here on the original exhibits. Printed copies of those exhibits essential to passing upon this petition are being furnished herewith.)

To the Honorable the Supreme Court of the United States:

The above named petitioners pray a writ of certiorari to review a final judgment [III 2348] of the United States Circuit Court of Appeals for the Second Circuit affirming a decision and judgment [I 202-47] of a chancellor sitting in the District Court for Western New York dismissing on the merits petitioners' complaints [I 7, 104] in consolidated causes charging fraud and conspiracy in the acquisition and execution of an agency.

The affirmance was based solely on a determination by the Circuit Court of Appeals (Circuit Judges Swan, Clark and Frank) that any claim for relief was barred by the New York statutes of limitation. The dictum of the New York case whose implication was thought to require this decision was considered so "incongruous" in result and its meaning so puzzling as to lead Judge Frank in effect to suggest this petition [128 F. (2d) 889 at 901-2; III 2346-7].

JURISDICTION.

This court's jurisdiction is invoked under Judicial Code, §240 (a), as amended by the Act of Feb. 13, 1925 [43 Stat. 938]. The judgment sought to be reviewed was filed July 6, 1942. [III 2348] Federal jurisdiction is based on diversity of citizenship. [Finding 1-a; I 203]

THE QUESTIONS PRESENTED.

This petition seeks the answer of ultimate authority to a question of self-evident importance:

First Question

> Are federal courts of equity compelled in cases where their jurisdiction depends on diversity of citizenship to follow the case and statute law of the states in which they sit respecting limitations, when such state law conflicts with equitable principles and bars relief for fraud irrespective of the victim's ignorance of the fraud because of the fraud and concealment of the fraud's perpetrator?

The opinions below implicitly assume an affirmative answer to this primary question. Given the correctness of such assumption, the remaining questions are:

Second Question

Did the Circuit Court of Appeals err in failing to hold that New York Civil Practice Act (cited herein as C.P.A.) §53 governed every claim for relief herein, and in holding that §48 of said act governed every claim for relief?

Third Question

A corporate fiduciary obtains from petitioners' testator (then in Europe) and others authority to act as their agent to sell their stock upon a commission basis. The agent's authority from decedent is obtained through false written representations made to him by his financial counsellor and fellow-stockholder whom the agent has asked to convey its proposal. The agent then secretly intends to deal in the subject matter of the agency in joint account with others with whom it later splits its commission from the sale arranged by it.

The agent conceals from its principal and the principal is kept ignorant of the fact that before a notice of sale is sent him and as a part of the arrangements for the sale, the agent has arranged to share in the profits to be obtained on a resale—such fact and the subsequent carrying out of the arrangements constituting the charged violation of duty in the execution of the agency. The concealment is effected and maintained by oral and written statements which are false both in expression and in omission. The principal knew at the time the sale was consummated that his agent, a commercial bank, was lending the purported purchaser about 38% of the purchase price. He knew after the consummation of the sale that the agent's officers were participating in a syndicate, which, so far as the principal knew, was formed only after the termination of the agency, and the principal himself participated in such syndicate in the belief that it had been organized in good faith after the ostensible purchaser had acquired possession of and title to his stock.

Can the conclusion of law be sustained that decedent was on notice of the facts constituting the fraud so as

to start the running of the statute of limitations when decedent's knowledge did not include: a) the only facts making wrongful the agent's conduct in the execution of the agency; or b) any facts which made the agent's acquisition of the agency wrongful?

The Statutes Involved.

The questions presented are concerned with the applicability of New York case and statute law respecting limitations, and whether the judgment herein is in conflict with such law. The statutes in question are quoted in pertinent part in Appendix A hereto (printed on inside back cover).

Summary Statement of the Case.

The controversy at bar arises out of the sale in 1928 of all the stock of Houde Engineering Corporation (Houde), of Buffalo, N. Y., a manufacturer of shock absorbers. Upon such sale respondent Manufacturers & Traders Trust Company*—Houde's commercial banker—collected what it invariably referred to as a commission of 3% for acting in the self-described capacity of broker.** That commission amounted to $126,318.33 [Ex. P-192; I 160, 164]

Petitioners are two of the three co-executors of Albert B. Shultz (decedent), who died June 3, 1932. [I 147-8, 153, 156] Decedent was a mechanic and inventor who founded Houde in 1919, and owned 46% of its stock. [I 12-13, 46] Although its president, he was unsophisticated in financial matters and had entrusted supervision of Houde's financial affairs to another stockholder (G. H. Chisholm), whom he trusted implicitly. [I 717, 722, 730]

Respondents are the Bank (sued individually and as de-

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* This respondent, together with Krauss and Company—a nominee partnership composed of its officers—are hereinafter collectively referred to as the Bank. [Finding 2, I 203]

** For typical documentary evidence, see Exs. P-98/9; P-116b; I 42. Relevant and typical testimony is that of respondent Harriman (the Bank's president) in previous litigation: "Q. The M. & T. Bank was agent to sell the stock and were getting a 3% commission for doing it, weren't they? A. That is right. Q. And you were attempting to earn that 3% on behalf of the Bank? A. I was always interested in earning that 3%, yes, sir" (I 548); and again: "You knew that Mr. Rea had this brokerage agreement whereby the Bank was going to get 3% in the event that it was sold? A. Yes. Q. And you said you were anxious to have the 3% made? A. That is right" [I 548].

cedent's remaining co-executor) and numerous individuals, many of whom were the Bank's officers, or directors, or both. Other respondents include the partners comprising the brokerage firm of Eastman, Dillon and Company, who together with one Buffington (in charge of underwriting at their Chicago office [I 9, 85-6]) are hereinafter collectively called "Eastman-Dillon"; G. H. Chisholm (Chisholm), who operated Atlas Steel Castings Corporation with his brother H. L. Chisholm and one Wyckoff (a bank director)—each of the Chisholms owning 12% of Houde's stock [I 159, 164; II 1334, 1343-4; Ex. P-27]; A. W. Sawyer (law partner of one Dudley, another bank director), counsel for respondent Rea and the brokerage and securities division of the Bank headed by him. [I 785; II 831; I 9, 63-4]

The complaints—substantially identical in allegation—seek an accounting and damages. [I 7, 104] An accounting for the value of all property and money received as profits is sought from all respondents who did not pay value for such profits or who took them with notice of their tainted origin. In addition, damages are sought from those respondents charged with fraud in the acquisition or execution of the agency to the extent that an accounting for profits may not make decedent's estate whole. [I 30, 127] By separate answers [I 43, 62, 63, 83, 128], substantially identical in substance, respondents denied the existence of a fiduciary relationship, and asserted a number of affirmative defenses, including that of limitations.

After a trial to the court without a jury, Burke, D. J., held that there never was any fiduciary relation between decedent and the Bank, thus eliminating the entire basis for the suits. Had such premise been warranted, the holding of the District Judge that no respondent had been "guilty of any fraud, deceit, breach of duty or other misconduct" [I 245] was likewise proper, and the effect of the statute of limitations was not involved.

The Circuit Court of Appeals did not adopt Judge Burke's holding that there was no fiduciary relationship, for its decision rests solely on what it conceived to be the New York law of limitations, which was involved only if there was a fiduciary relationship.

Because of the nature of the Circuit Court of Appeals' decision, the facts are here discussed only to the extent required to make intelligible the issue raised by the plea of limitations. The basic facts are not in dispute on any substantial issue and appear almost exclusively from respondents' own admissions as evidenced by their testimony and the documents they created. Unless otherwise indicated, and obvious exceptions excluded, *assertions of fact made in this summary statement will be based on such admissions.*

One-Paragraph Resume of Facts.

Those admissions—undenied, unretracted, unexplained—establish: at the time the Bank obtained its brokerage employment it secretly intended to become interested in the subject matter of its agency; during the life of its agency it secretly arranged to acquire interests in the profits to be gained on a resale of Houde's stock, either through an immediate resale thereof, or, such quick resale failing, through the medium of a selling syndicate to be formed by the ostensible purchaser (a Bank director) whose services as nominee were to be rewarded by a $500,000 syndicate participation—all of such arrangements antedating the dispatch to decedent of a written notice, false in every detail, to the effect that a binding sale had been effected; a supplemental arrangement provided that a quarter of the syndicate's net profits were to be reserved for the ostensible purchaser under the syndicate agreement, he to kick back the major portion of such reserved profit to the Bank's officers; the quick resale not being consummated, the syndicate was eventually formed as secretly prearranged, and used for the resale of Houde's stock with large resulting secret profits to the Bank's officers—all in strict pursuance of the prearranged formula for the division of such profits; weeks after these secret prearrangements, it was falsely represented to decedent that the ostensible purchaser (who had been represented as the independent and uncommitted owner of Houde's stock) had just decided to form such syndicate in which decedent was invited to and did participate. But all prearrangements made by the Bank and

its officers to form such syndicate and to share the profits nominally reserved for the ostensible purchaser were concealed from decedent by the Bank and its officers during his life time, and after his death were kept concealed from the courts which were considering other litigation involving Houde's sale by resort to false statements under oath. It is not claimed that decedent did know of these arrangements constituting the very core of the grievances for which redress is sought, and the trial court found that there was no evidence that he did. Clues to the existence of these arrangements first appeared in litigation arising after decedent's death. The suits at bar were filed shortly after the records in such litigation came to petitioners' notice. Documented detail follows.

The Evidence.

Between Sept. 6 and Oct. 18, 1928 decedent was away from Buffalo on a business trip to Europe. For nearly five weeks prior to his departure, respondent Rea (Vice-President in charge of the Bank's Brokerage and Investment Department) [II 992] had unsuccessfully sought to have him fix a price at which Houde's stock might be sold. Rea was then acting in behalf of the Bank, and, unbeknown to decedent, with Eastman-Dillon and a Chicago bank, Central Trust Co. of Illinois (Central), who were engaged in an "informal partnership" [II 941-2, 957] to realize profits from dealing in Houde's stock. The Bank had suggested "an attempt to get a definite price or option from" decedent [Ex. P-520], at the same time insisting that negotiations with decedent, who trusted it, be handled by the Bank, and the Bank alone, while the interest of Eastman-Dillon and Central remained undisclosed.*

Decedent declined even to negotiate with Rea in the absence of Chisholm, decedent's financial adviser and fiduciary, to whom he had entrusted all negotiations for the refinancing or sale of Houde. [I 730, 712, 728, 717, 36, 131]

* III 3140; Exs. P-54, P-56/62, P-520; *v.*, Harriman's explanation of Ex. P-520 [I 560]. Earlier in 1928 decedent had summarily rejected as unconscionable a plan of refinancing sponsored by Central and Eastman-Dillon. Decedent's rejection was "strong" and "in very forceful language." He then told its proponents that it involved "outrageous profits," leaving them well aware of his personal disfavor. [I 717-9, 734; II 1368-72; Exs. P-48/50]

Chisholm had left Buffalo in June, 1928, and did not thereafter communicate with decedent until after his departure for Europe on Sept. 6. [I 709, II 1343]

Chisholm returned to Buffalo shortly after decedent's departure for Europe. By Sept. 24, after numerous negotiating talks with Rea, Chisholm had reached an agreement that the Bank should have an option on his stock at a price of $4,000,000 for all of Houde's stock subject to the approval of the other stockholders. [I 719; II 1311-2] Apparently Chisholm had assured Rea that such price would be agreeable to all, for on the next day Rea was informing Eastman-Dillon over their private wire* that the other stockholders in Buffalo were not in accord with Chisholm's views and that he, Rea, had an appointment with all of them that afternoon in his office. [Ex. P-436]

At this meeting on Sept. 25 Rea told four of Houde's larger stockholders that he wanted an instrument to permit the Bank "to effect a sale" of their stock for $4,000,000, the Bank to act as a broker in return for a 3% commission [II 1389; Ex. P-99]. The instrument which Rea drew and gave to the stockholders for their signature contained words of option, but explicitly provided that the Bank "* * * will act as a broker in this transaction" in return for "a commission * * * of 3%". [Ex. P-99] An argument about price ensued, Chisholm being in favor of fixing a price of $4,000,000, and another stockholder, J. N. Scully urging a higher upset price. [II 1312-3]

Scully was not available to testify, and his deposition was read upon the trial. [I 327] It appears therefrom that Rea assured the stockholders at this meeting that a $4,000,000 price would only be a minimum and that the Bank would attempt as their agent to get more if it could;† on obtaining the assent of those present to his proposal,

* From July onwards Eastman-Dillon and Central were in constant communication with the Bank—by mail, private wire and long distance telephone—and were kept fully advised as to Rea's activities [I 639; II 1435-6, 1449].

† As this statement is not supported by explicit admissions, it is proper to say that Scully was wholly undisputed by Chisholm and completely corroborated by decedent's brother, B. D. Shultz [I 357-9]. Scully, who had made a memorandum of the events of this meeting shortly after their occurrence [I 341], is not claimed to have been impeached; his relations with decedent were intermittently unpleasant [II 938; I 629, 329, 335, 342]. Far from being

Rea asked them and they agreed to recommend the Bank's proposal to Houde's absent stockholders, Chisholm then agreeing at Rea's request to communicate with decedent to obtain his approval to such proposal [I 332]—this is undisputed and in substance admitted [II 1473-4] by Rea.

Chisholm took Rea's instrument [Ex. P-99] to Houde's attorney (I. L. Fisk) that evening, and redrew it the following morning [II 1317] to incorporate the latter's suggestions designed to protect 1) Chisholm, who was about to sign it in decedent's behalf, in the event that decedent's approval could not be obtained; and 2) all the prospective signatories thereof in the event that some of Houde's stockholders might not assent to the Bank's proposal. [See Fisk's working notes, Ex. P-100]

Such instrument as thus redrawn was thereupon signed by Chisholm in decedent's behalf, as well as his own, and by the other stockholders who had been present at the meeting on the previous afternoon. This instrument [Ex. P-98], was dated Sept. 26 and thereupon delivered to the Bank. Such instrument retained Rea's language of option and statement that the Bank "will act as a broker in this transaction" in return for "a commission * * * of 3%".*

In the only opinion ever written wherein the Bank's relation to Houde's stockholders was drawn in question, the New York courts held Ex. P-98 to be "a form of agency" as a matter of law—and this without the benefit of the numerous admissions in this record upon which petitioners rest their case (254 N. Y. App. Div. 128; *cf.*, 249 *id.* 88, and pp. 27-8, *infra).*

At the very time the Bank was entering into its agency, it intended to realize profits from dealing in the subject matter thereof [I 640].

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biased in petitioners' favor, decedent's brother was shown to have been cooperating with respondents and their counsel. [I 360, 369-70; III 2015] Rea, stigmatized by Frank, C. J., as "not worthy of belief" [III 2344, 128 F. (2d) 889 at 900], made admissions corroborating the essentials of Scully's testimony, discussion of which is omitted as without the scope of this petition.

*The only change made in this language was such as to emphasize the fact that the Bank was to have a commission only if it made a sale, thus disposing of respondents' argument that the commission was intended to be a rebate [cf., Exs. P-98/100].

Rea was out of town on Sept. 26 [Exs. P-393/4], but upon his return on Sept. 28 conferred at the Bank with Chisholm on the subject of getting decedent's approval of the Bank's proposal. Both were anxious about Chisholm's action in signing decedent's name to Ex. P-98—"wanted specific confirmation of (Chisholm's) ability to sign" for decedent. [I 719] Thereupon Rea formulated and sent decedent a cable [Ex. P-102a] over Chisholm's name asking immediate authority to conclude a sale of Houde's stock for $4,000,000 cash but failing to inform decedent that his name had been signed to Ex. P-98. [II 1394] Instead of cabling authority, decedent cabled a request that Chisholm telephone him in Paris. [Ex. P-104b] Chisholm complied on the evening of Sept. 29, but the telephone connection was so poor that all he could understand was that decedent wanted "full details" before taking action [I 720, 729].

Chisholm furnished "full details" in a lengthy cable [Ex. P-105a], prepared after a discussion with Rea to formulate its contents [II 1340; I 720-1], partly "quoting (Rea's) words". This cable was sent shortly after midnight on Sept. 30 (i. e., early on Oct. 1. [II 1320-3; Ex. P-106]), asking the decedent's authority by cable to permit the Bank to act as his agent to sell his stock at a minimum price of $4,000,000 for all of Houde's stock, plus its accrued earnings from Aug. 31 in return for a 3% commission. That cable opened with the statement that

> "Manufacturers Bank trying to get best price possible acting in our interests."

Chisholm was well aware of the fact that the Bank had no such intentions, *and so testified* [I 728-9]; that testimony is tantamount to a confession of fraud. Decedent cabled the requested authority on Oct. 2 [Ex. P-108]; Rea saw decedent's cabled consent. [II 1397]

Prior to Oct. 6, 1928, the Bank's officers believed that Houde's stock might be sold to General Motors Corporation at a price in excess of $4,000,000 and accruals; it had "had quite extended negotiations" with General Motors, resulting in such an offer to purchase. [I 460, 469-70] Acceptance of this offer was precluded because the Bank's

officers knew that decedent would not permit a sale to General Motors [II 1110; III 1929]; because a direct sale would have limited the Bank's profit to its commission, and the Bank intended to obtain in whole or in part the difference between the ultimate resale price and that at which a sale had been authorized [I 640]; and because General Motors' price was not sufficiently high. [I 460]

At Rea's suggestion the Bank decided on Oct. 6 to approach the respondent Cooley*. Cooley was a Buffalo industrialist of reputedly large means, was the ostensible sole proprietor of New York Car Wheel Company of Buffalo (Car Wheel), and was so regarded by the local business community.** [I 11, 46] He was a director of the Bank [Finding 3; I 204]

Rea broached the matter to Cooley on Oct. 8, and on Oct. 10 brought him to a meeting with respondents Wurst and Harriman (the Bank's chief executives [I 8, 45]) at the latter's office at the Bank to discuss the purchase of Houde's stock; by this time Cooley knew that the Bank of which he was a director was to "act as a broker in this transaction" in return for a 3% commission. [I 646, 648, 751; III 1796-7] The arrangements then made were such as to confront decedent (who sailed from Europe that day [I 165]) upon his return with the appearance of the accomplished fact of a bona fide sale concluded in his absence.

Cooley felt that "the deal was too big for" him. [I 754] In order to make it "feasible for" him [I 754], the following arrangements were made whereby he was to act as "purchaser". The Bank would attempt to close an immediate resale to General Motors, and, that failing, would form a syndicate to relieve Cooley of at least seven-eights of Houde's stock.† In the event of Cooley's death or dis-

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*I 644-6. Cooley and Rea were intimates; although New York Banking Law, §222 (now §130) forbade the making of loans directly or indirectly by trust companies to their officers, Rea had obtained access to credit at the Bank through participation with Cooley and another director in syndicates financed on Cooley's paper [I 749-50; Ex. P-150].

**Cooley controlled Car Wheel through ownership of one-third of the stock of Cooley Trading Co., Inc., a company trading in securities and wheat, which had among its assets three-quarters of Car Wheel's stock [III 1825-6, 2235]. Cooley and these companies are collectively referred to herein as Cooley.

†*I. e.*, "to relieve (Cooley) of approximately the amount of $3,500,000.00 of a total purchase of $4,000,000.00." [Ex. P-112].

ability prior to the syndicate's formation, the Bank's officers were to succeed to all rights in Cooley's "purchase" and save him harmless from any liabilities thereunder. The Bank's officers were "personally to take a substantial part of the purchase on" the syndicate. [I 753-4; III 1841-5, 1800, 1805-6; I 774, 779; Ex. P-112] Of these provisions, all but the last were embodied in a writing [Ex. P-112] signed by Cooley and the Bank's officers on the following morning, Oct. 11. [I 754-5; III 1803-5, 1928] This writing [Ex. P-112] was placed in the private files of the contracting parties. [I 507] Respondents have never claimed in their pleadings or otherwise that decedent knew of this document, or the arrangements evidenced thereby, and the trial court found that there was no evidence that decedent had such knowledge. (Finding 84 [I 221]; v., p. 15, *infra.)*

The arrangements concluded on the evening of Oct. 10 were made in complete disregard of common honesty. Although the Bank's officers knew that Houde's stock was worth more than the upset price of $4,000,000 and accruals [I 453, 460, 481], they did not ask Cooley to pay one cent more than that minimum. [III 2279] The reason for this is not left to inference; as Wurst testified: "If we had not thought there was a profit in it, it would not have been bought". [I 453] Indeed, the realization that "we could not be principals and agents both" was offered as Wurst's *explanation* of why Cooley was obtained as the "buyer" of stock which "we thought * * * a good purchase" [I 475, 481] for immediate resale to General Motors. [I 754-6] These avowals made the situation so clear that respondents' own counsel, speaking of the Bank's officers, informed the trial court that "naturally they went into this for a profit". [I 255]

After Cooley and the Bank's officers had signed Ex. P-112, the Bank mailed decedent a notice of sale dated Oct. 11 [Ex. P-101a], advising that "we have secured as a purchaser the New York Car Wheel Company of this city, which has agreed to purchase said stock *(i. e.,* all of Houde's stock) upon the terms of our option *(i. e.,* Ex. P-98) and has made available in our hands the sum of $4,000,000 therefor". Cooley at once went to Houde's plant where he was introduced as

"the new boss" and so treated. [III 1805, 2208]

This notice of sale was drawn by respondent Wurst (the Bank's Executive Vice-President) and signed by respondent Cantwell (Vice-President and head of the Bank's Trust Department as well as a partner in Krauss and Company). [III 1932; I 374-5; II 993]

Every statement of fact therein made was false. Neither Cooley nor Car Wheel had been secured as a purchaser for no compliance with the Statute of Frauds (New York Personal Property Law, §85) had been made. [I 745-6] In no real sense was Cooley the purchaser for his interest in Houde's stock was so small and the Bank's control thereof so complete as to constitute him a mere nominee. Neither Cooley nor Car Wheel had $4,000,000 on deposit on Oct. 11 [I 749] and no loan in that amount had then been approved [I 769], so that even accepting the explanation made by respondents that "available in our hands" meant either that that sum was on deposit or that a loan in that amount had been approved [I 457-67], the notice was wholly false. If decedent understood the notice of sale to mean that a loan had been made, as its author intended that he should [I 457-67], decedent was entitled to believe that such loan was *bona fide*, made in the regular course of the Bank's business, and involved no breach of fiduciary duty.* Rea, Harriman and Cooley knew the contents of this notice and knew it was being sent. [I 651, 769; II 1107; III 1845, 1932] Such notice made tender of the full amount of the purchase price allegedly but not in fact "available", thus enabling the Bank to claim, as it subsequently did claim, that title to Houde's stock passed on Oct. 11, thus stopping the running of accruals at that date.

Very early on Oct. 11, and hours before Ex. P-112 was signed, the Bank had set arrangements in train by long distance telephone to have the manager of General Motors' subsidiary manufacturing shock absorbers come to Buffalo on the following day to inspect Houde's plant. [I 650-1; II 1195; III 1896]

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* "Thus, an agent employed to sell may properly loan money to the buyer to complete his purchase * * *" (Restatement of Agency, §391, Comment b, p. 883).

It was only after plans for Houde's resale projected on the night of Oct. 10 were thus being carried into execution that Ex. P-112 was signed on Oct. 11. [III 1932] This instrument contained no reference to plans for the financing of Houde's acquisition also arranged on the night of Oct. 10. Cooley had no money with which to purchase.† Harriman knew this without being told and had "volunteered" [I 543] to have the Bank lend Cooley all money required to clear the deal upon his demand collateral note secured by Houde's stock and "six hundred odd thousand dollars of additional collateral," suggested by Harriman as "a fitting amount."*

Time had not sufficed on Oct. 10 for Cooley and the Bank's officers to "talk out" the details of their scheme. [I 774-5] A supplemental agreement was accordingly made —so respondents claim—on Oct. 13, when Cooley and the Bank's officers "came to an understanding" [I 747], whereby 80% of the profit on a quick resale to General Motors was to be paid over to the Bank, its officers and securities affiliate. Alternatively, a quick resale failing, the syndicate theretofore arranged was to be formed to take over Houde's stock, in which syndicate Cooley, the Bank, its officers and securities affiliate, and "such other individuals and corporations, as we shall agree upon, including—" Central and Eastman-Dillon "who were originally interested in refinancing" Houde "will be permitted to participate." In addition, 25% of the syndicate's net profits was to be retained by Cooley as his apparent profit, but he was to kick back 60% of this sum to the Bank's officers [Ex. P-113]. Cooley's original underwriting position of $500,000, as provided by Ex. P-112 (see last note on p. 11, *supra*), was discussed and left undisturbed [1774] by the parties to the "understanding".

This understanding was reduced to a writing, not produced by respondents because allegedly [II 3031] lost or

† III 1845-6; see proof as to accounts of Cooley and his companies at the Bank at I 523, 570-1.

* 550. $600,000 was 15% of $4,000,000, the minimum margin prescribed by New York Banking Law, §103 (then numbered §190); the "odd" thousands of dollars were stipulated so as to margin the additional purchase price represented by Houde's accruals, then still unknown.

stolen from the Bank! An alleged copy bearing date Oct. 13 [Ex. P-113] is in all respects *in pari materia* with Ex. P-112, and, as pointed out by Frank, C. J., was "but incidental to the previous secret agreement (*i. e.*, Ex. P-112)". [III 2342; 128 F. (2d) 889 at 899]

These arrangements, partially evidenced by Exs. P-112/3, were carried out to the letter. Their existence constitutes the core of petitioners' grievances, and without them neither decedent nor petitioners had cause for complaint.

Burke, D. J., found that there was no evidence that decedent knew of their existence [Finding 84; I 221], and Judge Frank points out that they were "elaborately concealed" from decedent. [III 2341-2; 128 F. (2d) 889 at 899] Respondents were fully aware of the significance of these fraudulent arrangements, not scrupling to resort to false statements under oath to conceal their existence from the courts in previous litigation involving Houde's sale; indeed, it appears in the suits at bar that respondents sought to perpetrate a fraud upon petitioners and the trial court, in an effort to obtain summary judgments, submitting affidavits on the subject known by them to be false to the effect that there never had been an underlying agreement to divide the profits upon a resale.*

Decedent reached Buffalo from Europe on October 18. [I 376] He then protested the sale of his stock, "insisted" that he would not go through with it and expressed dissatisfaction with the price. [I 465, 463]

Decedent's protest at the sale and declination to make delivery of this stock was founded on his suspicion, expressed to Wurst, that Cooley was not the actual purchaser, but a mere dummy or straw man for General Motors Corporation, to which, as the Bank's officers well knew [II 1110; III 1929], decedent was unwilling to sell. [I 377, 334-5] Wurst assured decedent that Cooley and not General Motors was the actual purchaser of Houde's stock.† While General Motors was not the actual purchaser, it has already

* A few instances are cited by Frank, C. J., in Note 7 to his opinion [III 2342-3; 128 F. (2d) 889, 899-900].

† I 377. The facts in this paragraph stated were in substance admitted in respondents' "Main Brief" in the District Court, pp. 55-6, and at p. 33 of their brief in the Circuit Court of Appeals.

sufficiently appeared that the statement that Cooley was the purchaser was but a half truth, if not wholly false, serving to conceal from decedent the Bank's interest in the transaction.

Faced with the alternative of a lawsuit or making good delivery of his stock, decedent decided to and on Oct. 22 did deliver it,* as did all of Houde's other stockholders, to the Bank which was ostensibly acting as a depositary or escrow agent to deliver the stock to Cooley against payment to the stockholders of their ratable share of the purchase price, less the Bank's 3% commission. [I 455, 536; III 1940] The Bank's depositary receipts (a sample is Ex. P-116b), drawn by Wurst and dated Oct. 22, stated that the Bank was to collect its 3% commission and amounted to representations that that commission had been duly earned. *(Wechsler v. Bowman,* 285 N. Y. 284) But, as the facts already stated make manifest, the Bank had not only earned no commission, but had already defrauded decedent and was in process of perpetrating further frauds upon him.

Decedent also learned on Oct. 22 that Cooley was proposing to organize a Delaware Corporation to be known as "Houdaille Corporation" for the primary purpose of protecting the name *Houdaille,* under which Houde's product was known. [II 819; Ex. P-332A]

On Oct. 24 all stockholders except decedent received checks certified by the Bank on Cooley's account in full of their respective shares of the purchase price of $4,000,000, plus Houde's accruals computed to Oct. 11 ($210,611) —the day on which a binding sale had purportedly been made. [II 160, 164; Ex. P-117] Decedent did not want to accept more than $250,000 out of a total of $1,884,091 due him (his ratable share of the purchase price, less the Bank's 3% commission), because he would have been unable to obtain bank interest thereon during the middle of a month under the local clearing house regulations.† [I 478-9, 483,

* Making good delivery required decedent to dispose of a claim asserted in his absence by the Scully brothers, also stockholders in Houde, the gist of which was that decedent had wrongfully received stock which was in truth treasury stock. [I 800]. Decedent settled this claim for $50,000 [III 1537-9].

† This interest was substantial—more than $1200 a week.

490; II 1132] Cooley agreed to pay decedent 4% interest on the deferred portion of his purchase price. Decedent and the other stockholders signed receipts prepared by Wurst, each of which refer to the deduction by the Bank of its "commission", amounting in total to $126,318.*

These receipts constituted representations (albeit false, as already noted) that the Bank was entitled to collect its commission. *Wechsler v. Bowman, supra.*

Decedent's receipt (Ex. P-542) had an addendum thereto signed by Wurst for the Bank whereby the Bank undertook to see that decedent received the balance of his deferred purchase price on demand; such balance amounted to $1,634,091 [I 160, 164], 32½% of the Bank's capital. [I 304] The Bank's liability on such guaranty was not entered on its books. [II 961; I 288-90] The utmost which these facts could establish is that by this receipt, which Clark, C. J., designated as "a highly significant document" [III 2330], decedent was advised that Cooley was being financed by the Bank to the extent of 38% of $4,210,611, the total purchase price of Houde's stock. As previously stated (p. 13, *supra*), such fact, had it been true, would have been wholly innocent, and no notice to decedent of the frauds being perpetrated on him; indeed, as respondents urged below, for an agent to sell to lend the purchaser money to consummate a sale is in furtherance and not in derogation of agency duty.

The payments to Houde's stockholders on Oct. 24 totalled $2,500,200, and were made by checks prepared by Wurst and certified by the Bank on Cooley's account, resulting in what was characterized on the Bank's books as an overdraft of $2,492,943 [Exs. P-155A, 158C, 162/3, 164A/B; III 1940]. This overdraft was covered by the Bank's issuance of a $2,500,000 credit to Cooley, secured by his demand collateral note pledging Houde's stock (already in the Bank's possession as depositary) and miscellaneous collateral valued at $636,909 [Exs. 153A/J]—exactly 15% of Houde's purchase price with accrued earnings.† (See last note on p. 14, *supra*.)

* V., receipts annexed to the complaints as Exs. C and D [I 42-3].

† This loan was made in the teeth of New York Banking Law §190 (now §103) requiring loans to directors to be first approved by a majority of the directors.

The following facts relate to the manner in which profits were realized from the fraudulent transactions, and under circumstances which demonstrate the "entanglements" at bar which call for a "discovery and accounting" (Cardozo, J., in *Buffum v. Barceloux Co.*, 289 U. S. 227 at 235, and *Falk v. Hoffman*, 233 N. Y. 199 at 203); they make it obvious that no remedy at law was ever available to decedent or to petitioners comparably adequate, certain and complete to that afforded in equitable suits for an accounting.

On Oct. 15, 1928, plans had been set in motion by the Bank, Eastman-Dillon and Central to organize a corporation to hold Houde's stock and make a public offering thereof.† On the eve of this public offering Eastman-Dillon withdrew from the joint venture [II 947-8], advising the Bank of this decision by a letter [Ex. P-74] dated Oct. 31, 1928, which stated that it knew of a purchaser (actually a promoter named Barnes [III 1657], uncovered by it on Oct. 16 [Ex. P-404]), who might be interested in buying Houde were the Bank interested in discussing its sale. This letter concluded with a reminder that "an equitable and satisfactory division of the commission derived from" Houde's sale was expected.

Eastman-Dillon's letter of Oct. 31 was acknowledged by return of mail, Rea writing [Ex. P-75] that he would be glad to discuss the sale of Houde with any prospect whom Eastman-Dillon had in mind. At the same time a syndicate agreement theretofore drawn by Sawyer [Ex. P-336; II 809-11] was revised with the assistance of Wurst and the advice of Harriman. [I 541, 532] Such syndicate agreement [Exs. D-4, D-8, P-178/9] was drawn for execution "as of" Nov. 1; its provisions are summarized below.

Upon receiving the Bank's letter [Ex. P-75], Eastman-Dillon telephoned Barnes and thereafter, on Nov. 2, wrote him confirming their telephone understanding "that in the event a deal is consummated" Eastman-Dillon, Harris-

† I 803, 790; III 1804; Ex. P-402. Cooley's inability to relate what these plans were underscores his nominee position throughout these transactions [III 1908, 1880-1]; he was obliged to refer all questions on the subject to Rea, stating: "Those details were not in my hands" [I 760].

Small & Company, (Detroit investment bankers who were backing Barnes--hereinafter called "Harris-Small") and Paul H. Davis & Company (investment bankers of Chicago) "will have an equal interest in the financing". [Ex. P-78] Eastman-Dillon wired, and on Nov. 2 wrote the Bank that Barnes or a representative of Harris-Small would call on Rea during the following week. [Ex. P-77.]

The syndicate agreement signed "as of" Nov. 1 was drawn in strict pursuance of the fraudulent arrangements made by Cooley and the Bank's officers during the life of the agency: 25% of the syndicate's net profits was thereby reserved to Cooley. Needless to say, the syndicate agreement did not disclose that this provision was inserted in pursuance of the dishonest arrangements (partially evidenced by Exs. P-112/3) concluded before decedent returned from Europe; nor did the syndicate agreement disclose the interest of the Bank's officers in the profit ostensibly reserved for Cooley alone. The ostensible purpose of the syndicate was to take over Houde at Cooley's cost, and thereupon operate and supply it with additional working capital. The term of the syndicate was to be one year with provision made for extending its life through a second year. The agreement provided for three syndicate managers, naming Cooley and Harriman as two of them; syndicate managers were to be permitted to become subscribers. Profits were to be divided among the subscribers ratably to their participations—after one-quarter thereof had been paid to Car Wheel "or its assigns" (*i. e.*, to Cooley its ostensible proprietor). The Bank then intended [Ex. P-75] that decedent should continue to act as Houde's production executive, together with Cooley,* who had been posing as Houde's owner since Oct. 11.

Subscriptions to this syndicate were solicited among the directors of the Bank immediately following a regular meeting of the Bank's board in the Bank's directors' room

*III 1819-20, 2208. The Bank knew that Cooley, who had spent his life in the foundry business [III 1824, 1908], had had no experience in the manufacture of precision machinery [I 696].

on Nov. 7. [I 538, 562-3; II 1154-6] This was four weeks after the Bank had supposedly effected a *bona fide* sale to Cooley, and two weeks after that sale had been consummated. Decedent was asked to and did subscribe to this syndicate; he knew that opportunity to subscribe to this syndicate, ostensibly controlled by Cooley, was being given to the Bank's directors, decedent's signature being preceded by those of some nine other directors of the Bank, including Wurst and Harriman. [Ex. D-4]

But decedent did not know that Cooley was essentially a nominee, and decedent's subscription to, and subsequent participation in the syndicate was under the impression fraudulently created by respondents on Oct. 11 [Ex. P-101a], and maintained by them on Oct. 18 [see p. 15, *supra*], that Cooley was an independent and *bona fide* purchaser of Houde's stock. Had this been true, as respondents succeeded in making decedent believe, decedent could have perceived no impropriety in Cooley's permitting any one whom he pleased to participate in a syndicate to take over his purchase.

This fraudulent pretence was continued by the Bank when the syndicate was formed and allotments of participations made therein on Nov. 14. [II 1046, 1255-7; III 1880, 2009; *cf.*, II 1260; I 550-52] On that day letters of identical tenor [II 1164] were sent to each syndicate subscriber advising each of the amount allotted to him in the syndicate "with the approval of Mr. Cooley." [Exs. P-535, 193A (quoted Finding 176, I 232-3)] In point of fact, as appears in the next paragraph, Cooley was not even in Buffalo on the day allotments of participation were made, the same day that a resale of Houde's stock for $6,000,000 had been arranged. Wurst drew these letters of allotment, signing them with the names of the syndicate managers [III 1956-7]; although neither he nor Rea were syndicate managers, both participated in making the allotments. [I 762-4] Twenty-three of the twenty-seven individual allottees were officers or directors of the Bank. Sawyer, the Bank's attorney in these transactions, was an allottee who subsequently transmitted part of his profit to another Bank director, his partner Dudley. [I 860-1] These allotments

totalled about 92% of the $4,250,000 syndicate. The Chisholms were secret participants in the syndicate profit, although not allottees, their partner Wyckoff having "given" them a portion of one of his allotments. [I 488-9; II 1067, 1332] There were but three other syndicate allottees: decedent, one Jackson, an automotive accessory manufacturer, and a large stockholder who was the father of a Bank director who did not subscribe. [I 166-74] Decedent knew that Cooley was associating Jackson in the enterprise, for he attended a meeting of Houde's board on Nov. 7, at which 1) Jackson as well as Cooley and Harriman were elected directors of Houde; and 2) Cooley, as Houde's "sole stockholder," assented to a by-law amendment creating a new chief executive office, that of Chairman of the Board, to which he was forthwith elected. [Ex. D-28]

On Nov. 14 Barnes and one Allington, a partner of Harris-Small, arrived in Buffalo to keep an appointment with Rea arranged by Eastman-Dillon. [Findings 178-82; I 233-5; Exs. P-419/22] By that evening Allington had informed his lawyer over the long-distance telephone that: 1) Houde was to be acquired for $6,000,000; 2) Houde's stock was to be held by a new corporation to be organized under the laws of Michigan, known as Houdaille Corporation—hereinafter called Houdaille (Mich.); 3) the stock of Houdaille (Mich.) would be listed and publicly offered within a period of one week. [III 1638, 1607-8, 1641-2] During the following five days Houdaille (Mich.) was organized [Ex. P-565], listing and blue-sky law applications for the sale of its stock prepared [Exs. P-569/70], and letter contracts submitted whereby Harris-Small ceded —pursuant to the terms of Eastman-Dillon's agreement of Nov. 2 [Ex. P-78]—two-thirds of its purchase in equal shares to Eastman-Dillon and Paul H. Davis & Company. [Exs. P-483/4, P-488] Activity no less brisk was proceeding in Buffalo. Cooley returned from New York [Ex. P-373] post-haste, conferring with his counsel, Mr. Morey, on Nov. 15 on the subject of tax avoidance on his anticipated profit, on the next day transferring his entire syndi-

cate allotment to his children. [Exs. D-77, P-170; III 1884-5, 2025; I 168, 171] Wurst took similar action on Nov. 15. [Ex. P-176; I 168, 171] On Nov. 15, Sawyer took steps to prepare his bill [Ex. P-327], which was dated Nov. 16, and amounted to $10,000 exclusive of disbursements. [II 860] Rea transferred almost all of his anticipated profit to Rea & Co., a tax avoidance partnership composed of his wife and himself, formed by Sawyer. [I 612; II 1463, 1502-3]

On Nov. 20, 1928, Allington returned to Buffalo and signed a formal contract for the purchase of Houde's stock from the syndicate managers. [Ex. B to Cpts., I 37-41] The syndicate had no title to the stock, nor any enforceable agreement for its purchase [I 771-2]; it never had physical possession thereof, nor funds with which to purchase [II 1258; I 170-1], and was without any capital. This embarrassment was obviated by having Cooley "individually and as holder of ~~the~~ record" subscribe a postscript to the contract "to signify his assent to the provisions thereof and his agreement to their performance." [I 42]

On the same Nov. 20, the Bank sent Central and Eastman-Dillon checks for $15,000, the letter to the latter stating that the remittance came "out of our commission for the sale of" Houde's stock [Ex. P-86]. Eastman-Dillon acknowledged this payment as "representing *our interest* in commission for the sale of" Houde's stock [Ex. P-96]. The Bank's transmittal letter [Ex. P-86] shows that Eastman-Dillon had also sought a share of the Bank's profits on the resale.

Decedent knew that Houde's stock was shortly thereafter acquired by Houdaille (Mich.) and that Harris-Small had made a public offering of that corporation's stock. Decedent purchased stock of the latter corporation from Harris-Small, continuing as Houde's president until August 1929; at that time he resigned his office with Houde, then selling his stock in Houdaille-Hershey Corporation, successor by consolidation to Houdaille (Mich.), also then resigning as an officer and director of Houde's holding corporation, Houdaille-Hershey.*

* Exs. D-40, D-61, P-262/3; III 1596, 1627. The statement in the opinion of Clark, C. J., [III 2332; 128 F. (2d) 889, 894] that decedent continued as an officer and director "for some years" is an obvious error, is supported by no evidence and is opposed to the only evidence [v., exhibits just cited].

(But there is no evidence that decedent knew that Harris-Small was a purchaser actually put forward by Eastman-Dillon, that Eastman-Dillon had a one-third interest in Harris-Small's purchase, that Eastman-Dillon had been in joint account with the Bank, and had claimed and received from the Bank a portion of its brokerage commission—all of which facts were sedulously concealed from decedent.)

Before any payment for Houde's stock was due from Harris-Small, the stock of Houdaille (Mich.) had been listed on the Chicago and Detroit stock exchanges and publicly offered. [III 1643] The ostensible offerors were Harris-Small and Paul H. Davis & Co., information as to Eastman-Dillon's participation in the offering being deleted from publicity statements and not appearing in the financial chronicles [III 1644-5, 1789; Ex. P-451]. On the day of the public offering (Nov. 22) the stock of Houdaille Corporation, for which Harris-Small had agreed to pay, but had not in fact paid $6,000,000, was selling for approximately $14,000,000 on the stock exchanges where the market was free and open. Eastman-Dillon's gross merchandising profit in cash on this transaction substantially exceeded $200,000; the value of the Houdaille (Mich.) stock received by it was then largely in excess of $500,000.*

The trial court excluded proof of damage until the issue of the right to an accounting had been established [II 1042]. Therefore the above figures do not represent net profit, nor do they include the profits of a syndicate entered into between Harris-Small, Eastman-Dillon and Paul H. Davis & Co. for the secondary redistribution of the stock of Hou-

* II 989; III 2177. The exhibits (*e. g.*, Exs. P-425/6, P-427D, P-483, P-488, P-565, P-569/70) show: Houdaille (Mich.), organized by the offering syndicate [III 1654], agreed to sell 108,000 shares of its Class A preferred (convertible into common, share for share) and 148,000 shares of its Class B common stock to Harris-Small in return for all of Houde's stock (about to be acquired for $6,000,000) plus $480,000 in cash. After setting aside 10,000 shares of common for the management of Houdaille (Mich.) Harris-Small sold one-third of its preferred and common to Eastman-Dillon for $2,160,000, and a like amount to Paul H. Davis & Co. for the same price. Each of the three firms then publicly offered and sold 36,000 units (consisting of one share of common and one share of preferred) of Houdaille (Mich.) stock at $66 a unit for a total of $2,376,000, each retaining 10,000 shares of common stock to boot. On the first day of trading the preferred closed at $53.50 a share, the common at $56.50 a share.

daille Corporation of Michigan. [v., Ex. P-460] Nor do they include the profits realized by Rea, Buffington and the individuals comprising Eastman-Dillon's firm from private dealings in Houdaille stock [I 695; III 2154; Ex. P-569].

On Dec. 3, the Buffalo syndicate received $6,000,000 by telegraphic transfer in full payment for Houde's stock [Exs. P-183/5, P-267, P-515]. Wurst then prepared the only account of its transactions in his own hand [Ex. P-192] showing payments made and to be made from this fund. If limitations do not bar relief, this account must be recast eliminating large items of syndicate expense* improper because of the unlawful character of the transactions at bar after giving effect to the return (tendered in the complaints [I 30, 127]) of decedent's syndicate profit.

On Dec. 5, 1928 decedent and all other syndicate participants were sent letters transmitting to them checks for their ratable share of three-fourths of the net syndicate profit upon the resale to Harris-Small. [Exs. P-517, D-41, quoted in Finding 200, I 238] Such letters (identical in form [II 1171]) set forth the price realized on resale, a rough summary of the syndicate expense, and the syndicate's net profit, and stated further:

> "By the terms of the underwriting agreement† *(i. e.,* the syndicate agreement) Mr. Cooley receives 25% of this sum, which amounts to $436,066.88 * * *" (parenthetical matter interpolated).

Pursuant to the secret arrangement summarized above, Cooley did not retain this sum. He secretly paid exactly 60% of it ($261,604.12) to the Bank's officers (or their wives, or assignees), obtaining cashier's checks for that purpose from a New York bank (where he had no account)

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* E. g.—payments to Sawyer for services in assisting in consummating a fraud on decedent [Ex. P-327], to auditors for services in setting up financial statements for use on the proposed financing in October [Ex. P-364], to the Bank for interest on a loan made to consummate a fraud [Ex. P-192], etc.

† Purporting to quote this sentence, Judge Clark's opinion states "By the terms of the *underlying* agreement Mr. Cooley receives 25% of this sum." This typographical error effects an unfortunate distortion. Decedent knew of the seemingly innocent underwriting agreement (Ex. D-4), but was kept in ignorance of the underlying agreements (partially evidenced by Exs. P-112/3) which would have warned him of the fraud.

selected by said officers for the avowed purpose of maintaining "a little privacy" and avoiding "gossip" and "bad feeling" [III 1862-6, 2005] Subdivision 2 of Judge Frank's opinion [III 2342; 128 F. (2d) 899] is devoted to an account of these "unpleasant evasive" methods, redolent with fraud, used to conceal the division of spoils between Cooley and the Bank's officers.

Meanwhile there had been placed on deposit for decedent with the Bank the deferred portion of his purchase price, together with interest thereon [Exs. D-50/1]. Wurst, through whom all these matters cleared [I 447], represented to decedent in writing that these moneys had been paid him by Cooley. [Exs. P-140/1]. In point of fact, these payments were made by Harriman's checks [Ex. D-50] on the syndicate account, such checks and all other checks on the syndicate account being signed by Harriman alone. [II 1171]

In summary: first, there is not alone no evidence that decedent knew of the Bank's arrangements with Cooley made during the life of its agency, the record conclusively establishes that those arrangements were consistently concealed from decedent, with repeated resort to fraud *(e. g.,* on Oct. 11, 18, 22 and 24) to maintain that concealment; second, without knowledge of such arrangements, every fact known to decedent was consistent with absolute honesty and fair dealing upon the part of the Bank, particularly in view of Wurst's assurance to decedent on Oct. 18 that Cooley was the actual purchaser of decedent's stock.

Respondents' Testimony after Decedent's Death Supplies Clues to their Frauds.

Decedent died on June 3, 1932, reposing complete trust in the Bank, which he named as one of his executors and trustees [I 147-8, 153]. It had long had physical custody of his securities [Ex. D-54]. Respondents themselves have urged below that decedent's trust in the Bank and its officers continued unshaken during his lifetime.

Clues to the frauds complained of did not come to light until long after decedent's death. Since the frauds complained of were of a self-concealing character, clues to their

existence came from the only persons who knew of them—the perpetrators thereof.

The first leak came in May, 1933, when Wurst gave a deposition as the principal witness for the Chisholms in an income tax controversy.* That deposition [I 445-92] was received on the trial herein as an admission against Wurst and the Bank [I 446]. Wurst's testimony thereon, given in frank and explicit detail,** was taken in the privacy of the office of the Chisholms' lawyer (Morey), who was also counsel for Cooley and a director of Car Wheel [I 445; III 2027]; as a lawyer experienced in tax matters [I 465, II 959], Wurst might well have assumed that there was little chance that his deposition which was to be filed in Washington would ever come to the attention of any aggrieved stockholder.

The disclosures made in that deposition might never have come to light had not Cooley quarreled in April, 1934, with one Goetz, an officer, director and substantial stockholder of Car Wheel. Beginning in May, 1934, much litigation ensued between Goetz and Cooley, the principal subject matter of which was Goetz's claim that Cooley's profit on the Houde transactions belonged in equity to Car Wheel [I 251-3, 262-3]. The uncontroverted fact is that during the month which elapsed between Cooley's quarrel with Goetz and the institution of the first of such suits, Car Wheel burned its books and records in large quantities [I 264-5].

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* This dispute involved the question of whether the Chisholms had successfully postponed the incidence of the income tax upon their anticipated profit in the Houde transactions subsequent to receiving the notice of sale of Oct. 11 [Ex. P-101a]. The Chisholms had thereafter formed a tax avoidance partnership, contributing their stock in Houde as its sole capital. This partnership made delivery of the stock and received payment therefor on Oct. 24. The Chisholms took and had to take the position that the relation between the Bank and themselves was one of option, and obtained a stipulation of facts to that effect [III 2212-3], upon which the controvery was determined adversely to them in the United States Board of Tax Appeals (29 B.T.A. 1334). This determination was reversed by the Circuit Court of Appeals for the Second Circuit (79 F. (2d) 14). This court refused certiorari (296 U. S. 641).

** Wurst had then had a number of occasions to refresh his recollection, not the least of which was a controversy involving the taxability of the moneys paid him out of the 25% profit ostensibly reserved for Cooley [Ex. P-583,—III 1963, 1912-3].

The Goetz litigation was succeeded in late 1934 by suits against the Bank brought by certain of decedent's fellow-stockholders in Houde who by that time had discovered what had transpired. These suits, seeking "damages for breach of a contract of agency or brokerage" (249 N. Y. App. Div. 88 at 89), were consolidated and brought to trial in March, 1936. [I 258] It was not until the eve of this trial, which resulted in a non-suit, that petitioners first heard that the Houde transactions had been called in question. [II 867-9]

Petitioners promptly sought information from the Bank, which stood in fiduciary relation toward them [I 147-8, 153]; they were repeatedly assured by the Bank, both orally and in writing, that there was no merit in law or fact to any claim that it had been guilty of wrongdoing.†

Judgment on the non-suit in the Bank's favor was reversed and a new trial awarded in late 1937 (249 N. Y. App. Div. 88). Petitioners at once sought counsel and in less than a month employed their present attorney. [II 871] Explanations were sought and investigation begun. [II 872-9; Ex. P-511]

Although Wurst (falsely [III 1989]) informed petitioners that all of the pertinent facts and circumstances had been developed in the trial of one of the Goetz cases (in which the Bank, Wurst, Harriman, *et al.*, had been defendants), the explicit written explanations asked of him were not forthcoming, and petitioners and their counsel attended the second trial in May, 1937, of the actions brought by the other stockholders. [II 872; Ex. P-511]

The outcome of this second trial was a verdict directed in the Bank's favor. The disclosures there made were such as to impel petitioners to ask Wurst for further explanations, and when these were not forthcoming, the Bank's resignation as their co-executor. [II 876-8; Ex. P-511] Shortly after the exhibits upon said second trial became available to them, petitioners started proceedings in the New York courts (early in 1938) to remove the Bank as their co-executor. [II 879-80]

† I 54-5; II 870; cf., the Bank's letters of Feb. 23 and Mar. 8, 1937 [Ex. P-511].

While such proceeding was awaiting decision,* petitioners obtained leave to and did file a brief *amicus curiae* upon an appeal taken by decedent's fellow stockholders from the judgment entered on the verdict directed in the Bank's favor on the second trial of their actions for breach of contract. In such brief petitioners argued that Ex. P-98, the instrument of Sept. 26 (upon which appellants in said litigation relied [Exs. D-33/34]), was a form of agency as a matter of law, citing *Greenough v. Willcox,* 238 Mich. 52 and other cases to this effect. The Appellate Division adopted this theory *in toto*, citing *Greenough's* case as the only authority in its opinion. The judgment for the Bank was affirmed (254 N. Y. App. Div. 128) by a divided court on this theory: that although agency had been established, there was no evidence of violation of agency; that the appellants having called Harriman as their own witness, they were concluded by his own statements to the effect that the sale to Cooley had been *bona* fide, etc., etc. etc.† This judgment of affirmance was in turn affirmed in 1939, but without opinion (279 N. Y. 781). Thus the New York courts held that the relation between Houde's stockholders and the Bank was one of principals and agent, and this upon a record devoid of the conclusive admissions found in the present record.

Petitioners' case, where not documentary, rests in principal part on admissions read from the respondents' testimony in the litigation above described and in the extensive depositions taken in the present suits.

The first of the suits disposed of by the judgment at bar was filed Sept. 14, 1938, on the equity side of the District Court (there designated Equity No. 2279); the complaint in the other suit (there designated Civil Action No. 182) was filed to reach additional parties on June 5, 1939. [I 2-3] Respondents Bank, Cantwell and Rea are parties to this

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* An order sustaining a demurrer to the jurisdiction was affirmed at 254 N. Y. App. Div. 928.

† Needless to say, there was no evidence in that record of the existence of any such agreement as that evidenced by Ex. P-113 (see pp. 14-5, *supra*)—the very existence of which stood denied under oath as late as July of 1939 [II 1065-6].

second action† which was immediately consolidated with the former [I 174; 29 F. Supp. 37], the complaints being substantially identical in allegation and purpose (*i. e.*, to require an accounting of all profits and such damages in addition as might have been sustained by decedent's estate for which profits might not make decedent's estate whole).

The Opinions Below.

The trial court filed an opinion [40 F. Supp. 675; I 177-202] and thereafter findings of fact. [I 202-45]

Circuit Judges Clark and Frank wrote in the Circuit Court of Appeals [III 2323; 128 F. (2d) 889]; their opinions are implicit with a common premise, viz.: federal courts of equity must apply the local law of limitations.

Judge Clark's opinion (which may or may not be a prevailing opinion) states the writer's readiness to accept the findings of the trial court as supported by evidence and the propriety of the legal conclusions based on those findings. But in this view Judge Clark was in the minority, for he notes that "the court as a whole" felt that the appeal should turn on the narrower issue of limitations. [III 2325; 128 F. (2d) 891]

Judge Clark held that any claim for relief at bar is governed by the New York statutes of limitation which constitute a complete defense. This conclusion rests on a construction of *Wechsler v. Bowman*, 285 N. Y. 284 (decided subsequent to the submission of the suits at bar), upon which both opinions below rely, and which is discussed in the accompanying brief. Petitioners submit that that case has been misconstrued, and that in any event the construction adopted has become untenable by reason of a later decision of the New York Court of Appeals.

Analysis of Judge Clark's opinion is difficult because it is impossible to state with certainty where Judge Clark's (presumably minority) views as to the merits end and where his views on the issue of limitations begin. Its salient points seem to be as follows:

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† Rea was a non-resident of New York from 1931 until six weeks before he was served [II 1416-7; I 602], and thus without the protection of any statute of limitations (C. P. A. §19). *Banister v. Solomon*, 126 F. (2d) 740 (CCA 2).

1. The rule that Federal courts of equity will not follow state statutes of limitation where their application works inequity *(Kirby v. Lake Shore & M. S. Railroad,* 120 U. S. 130; *Russell v. Todd,* 309 U. S. 280 at 288) has no application because the suits at bar do not seek "purely equitable relief."

2. The ten-year statute of limitations governing New York suits in equity (C. P. A., §53) is inapplicable for the same reason.

3. The six-year statute of limitations of New York governing actions for fraud (C. P. A., §48 [5]) which postpones accrual of the cause of action until its discovery does not help petitioners. Two grounds are assigned for this holding: 1) the statute applies only where the fraud is accomplished through conspiracy—a proposition for which no New York case or statute law is cited or has been discovered; 2) decedent was on notice of the facts constituting the fraud upon him.

Judge Clark does not disapprove the trial court's 84th finding of fact to the effect that there is no evidence that decedent knew: a) of the arrangements between Cooley and the Bank and its officers preceding the dispatch to decedent of a notice to the effect that a binding sale of his stock had been effected, or that a document (Ex. P-112) was in existence evidencing those arrangements; or b) that prior to decedent's return from Europe Cooley had undertaken to kick-back 60% of the reserved one-quarter of the net profits of the syndicate theretofore arranged to the officers of the Bank, or that such undertaking was evidenced by a writing (Ex. P-113).

Since these facts were the very facts constituting the frauds complained of, Judge Clark apparently perceived the flaw in the conclusion that recovery was barred because decedent was on notice of the facts constituting the frauds, and so a new theory of limitations is interposed. Those facts of which decedent had no knowledge are treated separately; out of the total amount of damage, a moiety thereof is selected and specifically allocated to such facts of which decedent had no knowledge. And recovery of this specific

sum is denied on a separate ground, viz., that such fraction of the damage sustained might have been recovered in an action for money received, and therefore that the straight six-year limitation (C. P. A. §48[1]) should apply on the supposed authority of *Wechsler v. Bowman*, 285 N. Y. 284.

Judge Clark seeks to obviate the difficulties interposed by subdivision a of the 84th finding by assuming that since decedent knew of the Bank's participation* in a syndicate (which so far as decedent knew was not formed until weeks after a binding sale to Cooley had been effected, and the agency thereby terminated), it is of no moment whether this syndicate was part and parcel of the arrangements under which Cooley had actually made his "purchase," *during the life of the agency.* Subdivision b of the 84th finding is attempted to be disposed of by the proposition that since decedent knew that Cooley was to have 25% of the profits of a syndicate supposedly formed by Cooley long after he had been bound to a sale, decedent might not have cared that the Bank's officers had acquired interests in what was ostensibly Cooley's reserved profit as well as in the syndicate proper pursuant to arrangements made prior to decedent's return from Europe and not disclosed to him when he was seeking to avoid going through with the sale. It is submitted, with respectful deference, that fiduciary fraud can not be legalized by the possibility that the victimized *cestui* might not object.

4. The only other theories upon which petitioners could obtain relief were in actions *ex contractu* for money received or *ex delictu* for damages—governed respectively by the six-year statute prescribed by subdivisions 1 and 3 of C. P. A., §48. Judge Clark concludes that such is the essence of petitioners' claim, construing *Wechsler v. Bowman*, 285 N. Y. 284, to such effect.

Frank, C. J., filed an opinion for concurrence "but with the gravest doubts so far as the Bank and its principal officers are concerned." [2337; 128 F. (2d) 897] Character-

* Although decedent knew that the Bank's officers and directors participated in the syndicate, there is no evidence that decedent knew of the Bank's participation therein.

izing the testimony of the Bank's officers in these suits as "not worthy of belief" [III 2344; 128 F. (2d) 900] Judge Frank severely criticises their conduct in the transactions at bar as well as their testimony—noting that decedent's participation in the syndicate was under the impression, sedulously cultivated and maintained by the Bank, that a *bona fide* sale had been effected to Cooley long before there was any talk of syndicating his purchase. [III 2340-2; 128 F. (2d) 898-9]

But Judge Frank, "although puzzled," agreed that *Wechsler v. Bowman, supra,* appeared to bar any claim for relief. His opinion concludes

> "Yet I should not be surprised if the New York courts, in some later case, should hold that this conclusion is wrong with respect to commissions paid by the principal in such circumstances as are found here, or if the United States Supreme Court, should it review our decision, were to hold that we had misunderstood the Wechsler case." [128 F. (2d) 889 at 902; III 2347]

Swan, C. J., filed no opinion.

Reasons for Allowance of Writ.

I. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court. (Argued in supporting brief, p. 36 *infra.*)

II. In any event, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should now be settled by this court. (Argued in supporting brief, p. 38, *infra.*)

III. The Circuit Court of Appeals has decided an important question of federal law in conflict with the decisions of other Circuit Courts of Appeal. (Argued in supporting brief, p. 38, *infra.*)

IV. Assuming the applicability of local law, the Circuit Court of Appeals has decided important questions of New York law in conflict with applicable New York case and statute law, in this, to wit: a) by holding that no claim for

relief herein is governed by the ten-year period of limitations prescribed by C. P. A. §53, and that any claim for relief herein is barred by C. P. A. §§48 (1) or 48 (3); b) in its erroneous application of C. P. A. §48 (5), prescribing a six-year period of limitations for actions for fraud, but postponing accrual of such causes of action to discovery of the facts constituting the fraud; c) in its misconstruction of *Wechsler v. Bowman,* 285 N. Y. 284, and its erroneous application of that case as misconstrued to petitioners' claims—assuming that *Wechsler's* case retains authority in the light of a subsequent decision of the New York Court of Appeals. (Argued in supporting brief, p. 40, *infra.)*

CONCLUSION.

Wherefore, petitioners respectfully pray that this petition for a writ of certiorari be granted.

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